

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 02-145
Competition in the Market for the	)	
Delivery of Video Programming	)	
of the Commission's Rules	)	

**REPLY COMMENTS OF COMCAST CORPORATION**

Thomas R. Nathan  
COMCAST CABLE COMMUNICATIONS, INC.

Joseph W. Waz, Jr.  
COMCAST CORPORATION  
1500 Market Street  
Philadelphia, Pennsylvania 19102

James R. Coltharp  
COMCAST CORPORATION  
2001 Pennsylvania Avenue, NW  
Suite 500  
Washington, D.C. 20006

August 30, 2002

James L. Casserly  
MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY AND POPEO, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

## **EXECUTIVE SUMMARY**

The record in this proceeding provides abundant evidence of the intense competition that cable operators face and the considerable effort that cable operators are making to develop, deliver, and successfully market innovative services.

In response to competitive pressures, Comcast is placing a heavy emphasis on promoting digital video services, which provide customers with scores of additional networks as well as additional premium channels, powerful electronic program guides, and – in a growing number of communities – the flexibility of video-on-demand and the quality of high-definition television. Consumers are reacting favorably; despite the availability of competitive alternatives, Comcast’s digital cable subscribers increased almost 37% over the past year. Comcast’s high-speed cable Internet service also showed strong growth (approximately 27%) over the past year. This service is available to nearly 11.6 million homes (which is more than 82% of the homes in areas served by Comcast). New services are unquestionably the key to future growth.

Comcast faces aggressive competition for all of the services that it offers. In every market we serve, consumers have a choice of at least three facilities-based multichannel video programming distributors, including two DBS providers with a nationwide reach and all-digital platforms. In a number of markets, we also face overbuilders like RCN, WideOpenWest, and Knology. And non-MVPD delivery mechanisms – including multi-channel digital broadcasting, video streaming over the Internet and delivery of DVDs by mail – are providing additional competition. (To say nothing of the competition from wireless, satellite, and especially telephone companies in providing Internet services.)

In this environment, notions of “monopoly” and “market power” and “dominance” in video distribution are vestiges of a bygone era; they simply do not apply to current facts. Competition for viewers’ attention is intense. Consumers have multiple means of obtaining video programming that are not subject to MVPD control, even if there were not such robust competition among MVPDs. As a result, MVPDs must continue to invest and to innovate, each one hoping to outdo its competitors in delivering the services that consumers want, at prices they are willing to pay.

Comcast urges the Commission to use this year’s annual report to acknowledge the robust competition that has emerged in the business of delivering video programming to consumers. Instead of merely reporting on the incremental changes from the prior year, we urge the Commission to recognize, explicitly, the many different ways in which video programming can be delivered to consumers – both through competing MVPDs *and* independent of any MVPD – and the intense competition, significant capital investment, rapid technological change, and concomitant risk that now characterize the video marketplace. We also suggest that the Commission describe the fundamental changes that have occurred in video programming delivery since 1992 and conclude that these salutary developments are most likely to continue if regulation of cable operators is kept to the absolute minimum required by law.

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These reply comments supply current information in answer to various questions propounded in the Notice of Inquiry ("Notice").<sup>1/</sup> Comcast also responds here to various comments filed by other parties in the initial round.<sup>2/</sup> Both discussions underscore central themes of Comcast's initial comments, which highlighted the intense competition that cable operators face in the video marketplace and the considerable effort that cable operators are making to develop, deliver, and successfully market innovative services.

**I. CURRENT MARKET DATA**

The Commission's Notice seeks to gather general statistical data about the characteristics of various market participants as of June 30, 2002. Although it is clear that public policy decisions must be based on a *dynamic* assessment of market conditions, with full appreciation of the competitive effects of the *availability* of competition,<sup>3/</sup> there

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<sup>1/</sup> The Notice requested data as of June 30, 2002. Such data were not available for Comcast at the time initial comments were required to be filed.

<sup>2/</sup> Citations to comments filed by other parties in this proceeding on or about July 29, 2002, are cited herein using a shorthand form (*e.g.*, NCTA Comments at 12). More conventional forms are used in citing documents from other proceedings.

<sup>3/</sup> *Time Warner Entm't Co v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) ("*Time Warner II*").

is still some utility in a market “snapshot” as of a particular date. The following paragraphs provide additional “pixels” for that snapshot.

As of June 30, 2002, Comcast cable systems passed 14.04 million homes, up from 13.70 million one year earlier.<sup>4/</sup> We had a total of 8.5 million cable subscribers, a pro forma twelve-month trailing growth rate of 0.9%.<sup>5/</sup> “Penetration” levels were at 60.6%, down 0.9% from the prior year.<sup>6/</sup>

While there was little change in aggregate subscriber numbers, there was a significant change in the mix of services available to and subscribed to by consumers. Consistent with the company’s heavy emphasis on promoting digital video services, Comcast had 1.981 million digital cable subscribers as of June 30 (an increase of 36.9% from the 1.447 million of a year ago) and a penetration rate of 23.4% (as compared to last year’s 17.9%).<sup>7/</sup> Comcast now hopes to add a total of 700,000 to 800,000 digital cable subscriptions in calendar year 2002.<sup>8/</sup> These digital video offerings provide access to additional premium channels and dozens of digital networks.<sup>9/</sup> Our digital subscribers also receive an electronic programming guide that provides superior navigation,

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<sup>4/</sup> Press Release, *Comcast Reports Strong Second Quarter Results*, at 8 (Aug. 1, 2002)(“*Comcast 2Q02*”).

<sup>5/</sup> *Id.* at 8.

<sup>6/</sup> *Id.* This represents the number of homes passed by Comcast’s cable systems divided by the number of subscribers to Comcast’s cable services.

<sup>7/</sup> *Id.* at 8.

<sup>8/</sup> *Id.* at 3.

<sup>9/</sup> Customers who subscribe to Comcast digital cable receive more than 250 channels, including dozens of commercial-free premium channels, access to an array of full-season sports packages, 45 channels of commercial-free music, an interactive on-screen guide, and more. In addition, digital customers who subscribe to a premium service receive, at no extra charge, multiplexed screens of that premium service. For example, a customer who already receives HBO and purchases a digital tier automatically receives an additional 12 screens of HBO at no additional charge.

additional programming information, viewing “reminders,” and powerful parental controls.

Helping to drive this demand for digital service was the continued rollout of video-on-demand (“VOD”). Customers can select from a broad and growing array of movies and other program content using their digital cable box. Since VOD has complete VCR functionality, customers can rewind, fast-forward, and pause programs, and can store selections for up to 24 hours from the time of ordering. Comcast currently makes VOD functionality available to over 3.2 million homes,<sup>10/</sup> and we remain on track to make VOD available to nearly 50% of homes passed by year-end.<sup>11/</sup> Although VOD is commonly thought of as a way to deliver movies to consumers for a fee (*i.e.*, as essentially an improved pay-per-view offering, in which movies can be viewed at the times of the viewers’ choosing),<sup>12/</sup> Comcast is increasingly focusing on delivering other VOD content at no additional charge as a means of driving sales of digital video.<sup>13/</sup>

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<sup>10/</sup> Comcast 2Q02 at 2. VOD is currently available to Comcast subscribers in Mobile, AL; Savannah, GA; Indianapolis, IN; Baltimore and Howard Counties, MD; Taylor and Southeast Michigan; Garden State, Monmouth, Ocean and Union, NJ; Albuquerque, NM; Lower Merion and Willow Grove, PA; Charleston, SC and Alexandria and Arlington, VA.

<sup>11/</sup> Comcast 2Q02 at 2.

<sup>12/</sup> Initially, customers can order a la carte programs on a title-by-title basis. New releases are \$3.95 and library titles are \$2.95.

<sup>13/</sup> See, e.g., Diane Mermigas, *Comcast betting big on free VOD*, Multichannel News May 6, 2002, available at <http://www.emonline.com/deals/050602dicolumn.htm> (Comcast President Brian “Roberts has set the ambitious goal of blanketing more than 6 million of its nearly 13 million homes passed with free VOD options this year by putting digital set-top boxes in homes and giving viewers on-demand access to 750 hours of brand name news, sports and entertainment at no extra charge”); Mike Stump, *Comcast’s Watson Cooks Up VOD*, Multichannel News, July 15, 2002 (Dave Watson reveals Comcast’s plan to “launch the world’s most comprehensive package of on-demand content this fall” in Philadelphia; “[w]e have significantly boosted the amount of free content we expect to deploy . . . . [T]he free content component can be a win-win . . . .

Games, distance learning, how-to programs, and foreign language programming are all potential elements of the mix. Comcast also expects to introduce enhancements, like themed packages, volume ordering, and monthly subscriptions.<sup>14/</sup>

Comcast also hopes to stimulate demand for digital TV by offering high-definition television (“HDTV”) services. As noted in our first-round comments, Comcast has offered HDTV to 1.3 million customers in Pennsylvania, New Jersey, and Delaware since autumn 2001<sup>15/</sup> -- we were one of the first cable companies to make HDTV available. We have also announced plans to provide HDTV in Detroit, Indianapolis, and the Washington, DC area.<sup>16/</sup> The Washington area deployment will begin in Northern Virginia in September, with a full commercial launch in October. We plan to carry HDTV signals of the NBC and CBS affiliates, HBO, Showtime, and WETA. Comcast SportsNet will offer more than 200 professional sporting events in HDTV annually starting in 2003, about half in the Philadelphia market, and half in the Baltimore/Washington, DC markets.

Comcast continues to provide customers with new advanced services. Nearly two years ago, Comcast announced its agreement to deploy Wink in certain systems totaling over 1.5 million Comcast customer homes. Wink gives viewers a free and convenient

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We think the best solution is to not charge incrementally for the on-demand component of the programming”).

<sup>14/</sup> In certain markets, Comcast is actively testing subscription video on demand (“SVOD”) with Starz!, Showtime and HBO. For an incremental charge, customers can access a library of network content whenever they want.

<sup>15/</sup> Comcast Comments at 6. These HDTV broadcast signals are part of Comcast’s basic service package and are available to all customers at no extra charge, except for the HDTV equipment necessary to view the signal.

way to interact with programs and advertisements while they continue to watch TV. By clicking their remote control during an enhanced program or advertisement, the viewer can access program-related information, such as weather, sports updates, trivia and play-along games; request product samples, coupons and other free offers from advertisers; or make purchases instantly. This service has now been deployed to Comcast customers in Florida, Virginia, Maryland, and Delaware. Comcast has also deployed WorldGate's ITV services in Huntsville and Tuscaloosa, Alabama. The WorldGate ITV service includes a variety of content including updated weather forecasts, horoscopes, recipes, stock quotes, headline news stories, entertainment links, sports scores, and more. All of these user-friendly features will be marketed as part of Comcast Digital Cable and are designed to help enhance the value of our digital cable offering.

Earlier this year, Comcast announced a long-term agreement with Gemstar-TV Guide International to provide interactive program guide ("IPG") services in a majority of Comcast cable homes, including its six major market clusters. Comcast also uses TVGateway, a joint venture involving Comcast and other cable operators. TVGateway has been deployed in Comcast's Mobile, AL and Lower Merion and Willow Grove, PA systems.

Comcast's high-speed cable Internet service also showed strong growth over the past year. As of June 30, Comcast had 1.169 million high-speed Internet customers, representing a 26.8% pro forma increase over 2001 levels and a 39.0% increase in net

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<sup>16/</sup> *Id.* at 6. As we also noted, *id.* at 6-7, Comcast joined with the cable industry in taking a leadership position in response to Chairman Powell's call for voluntary industry efforts to accelerate the HDTV transition.



additions over the previous quarter.<sup>17/</sup> This service is available to nearly 11.6 million homes (which is more than 82% of the homes in areas served by Comcast), and the service now has a penetration rate of over 10% of marketable homes.<sup>18/</sup> One year earlier, the service was available to only 8.774 million homes and had 675.6 thousand subscribers, and the penetration level in marketable homes was 7.7%.<sup>19/</sup>

The story that these figures tell is that new services are the key to future growth.<sup>20/</sup> This is a radical change from the past, when cable companies focused more on driving cable penetration and adding another dozen channels of analog video programming. Today, the percentage of homes passed that subscribe to Comcast's services is declining somewhat, reflecting competition from DBS and cable overbuilders. But, because the average Comcast customer is choosing to purchase more services, revenue is continuing to grow. The continuing rollout of new services, features, and capabilities – including VOD, HDTV, and (post-merger) cable phone services<sup>21/</sup> – will all contribute to this growth in the future.<sup>22/</sup>

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<sup>17/</sup> *Comcast 2Q02* at 2.

<sup>18/</sup> *Id.*

<sup>19/</sup> *Id.* at 8.

<sup>20/</sup> In the company's most recent quarterly earnings call, John Alchin, Comcast's Executive Vice President and Treasurer, stated that over 60% of Comcast's cash flow growth is attributable to just two new products, digital video and high-speed cable Internet.

<sup>21/</sup> In conjunction with our planned merger with AT&T Broadband, Comcast has undertaken to roll out facilities-based phone service, delivered over the cable plant, to one million households in Philadelphia and Detroit. Applications and Public Interest Statement of AT&T Corp. and Comcast Corporation, MB Docket No. 02-70, at 38 (Feb. 28, 2002) ("*Public Interest Statement*"). Comcast's plan to deploy VoIP in Philadelphia continues to advance. Comcast has already begun to install equipment that will be used for the initial deployment of residential VoIP phone service in the Philadelphia area. Comcast has recently completed a number of technical lab trials of VoIP phone service and will begin field testing leading to commercial deployment in a portion of the

## II. CURRENT STATE OF COMPETITION

Comcast faces aggressive competition for all of the services that it offers. In every market we serve, consumers have a choice of at least three facilities-based multichannel video programming distributors (“MVPDs”), including two DBS providers with a nationwide reach and all-digital platforms. In a number of markets, we also face overbuilders like RCN (present in the Philadelphia suburbs<sup>23/</sup> and Washington, DC and

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Philadelphia market in the second quarter of 2003. *See* Letter from James L. Casserly, Counsel to Comcast, to Marlene Dortch, FCC, MB Docket No. 02-70 (July 26, 2002) (transmitting two Comcast press releases regarding IP phone progress). Comcast expects that its proposed merger with AT&T Broadband will allow it to take advantage of the significant expertise AT&T Broadband has gained in providing telephony service over its cable systems. *Public Interest Statement* at 39-42.

<sup>22/</sup> The Notice also asks about compliance with closed captioning and video description requirements. Notice at ¶ 19. Comcast is currently in full compliance with these requirements, including the video description rules that went into effect in the second quarter of 2002, and we expect to remain so. Comcast’s programming agreements require all its third-party programmers to meet or exceed all FCC rules and regulations concerning closed captioning. With respect to each video programming service distributed by Comcast’s cable systems, Comcast seeks on a quarterly basis a certification from the applicable video programming provider that it has complied with the pertinent closed captioning and video description requirements. Upon receipt of each certification, Comcast reviews the certification to independently determine whether the video programming provider has in fact complied with these requirements. Comcast maintains the quarterly certifications in a designated central file, and also provides copies of such certifications to each of its cable systems.

The Notice also inquires (¶ 16) about PEG and leased access channels. 100% of Comcast’s cable systems carry some form of PEG and/or leased access programming. On a company-wide basis, we have 740 PEG and leased access channels out of a total of 27,436 basic, expanded basic, and premium channels, which is about 2.7% of our channel capacity devoted to local and federal requirements (not counting must-carry). If digital channels are included, the denominator becomes 67,175 channels, which makes the PEG and/or leased access channels represent approximately 1.1% of our total channels.

<sup>23/</sup> RCN continues to compete vigorously in Delaware County, PA, where it holds 21 franchise agreements and is providing competitive video, voice, and data services in 20 of those communities. RCN also holds various other franchises (*e.g.*, Union, NJ, and five municipalities in Bucks County, PA) where it is not yet providing service.

surrounding areas),<sup>24/</sup> WideOpenWest (present in dozens of Michigan and Indiana communities), Knology (Charleston, South Carolina; Panama City, Florida; Huntsville, Alabama; and Knoxville, Tennessee),<sup>25/</sup> and Millennium (Anne Arundel County, MD). And, as demonstrated below, non-MVPD delivery mechanisms provide additional competition to MVPDs.

The first-round comments filed by other parties provide substantial evidence of the highly competitive nature of the video business, and developments subsequent to the filing of the first-round comments provide still more proof. Among the first-round commenters, DirecTV confirms that its growth continues unabated; its customer base went from 9.6 million to 10.7 million over the past 12 months.<sup>26/</sup> Over half of these customers were cable subscribers at the time they first subscribed to DirecTV,<sup>27/</sup> and “the

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<sup>24/</sup> RCN is currently providing cable or OVS service under the Starpower name in Washington, DC, and in Gaithersburg, [Silver Spring](#), [Bethesda](#), [Chevy Chase](#) and [Takoma Park, MD](#).

<sup>25/</sup> In North Charleston and Charleston County, Knology has overbuilt 80% of Comcast’s system and has over 4300 customers.

<sup>26/</sup> DirecTV Comments at 11. This is despite a DirecTV price increase that slowed growth somewhat. *Hughes’s Results Top Forecasts, with Strong DirecTV Showing*, Dow Jones Newswires (July 15, 2002) (customer turnover was “slightly higher than expected, because DirecTV eliminated its lowest-price TV package for new subscribers and hiked the price for existing customers by \$3 to \$24.99 a month”); Mavis Scanlon, *DirecTV’s Price Hike Sent New Sub Numbers South*, CableWorld, July 22, 2002, at 6. In fairness, it must be noted that DBS providers, as well as overbuilders, are facing the same rapidly escalating costs for programming that cable operators are encountering. See, e.g., Andrea Figler, *DBS Prices on the Rise, Too*, CableWorld, Jan. 15, 2002 (reporting on 10% price increase by EchoStar, spokesman Marc Lumpkin attributes the increase to “programming costs”; article also notes, “Like EchoStar, DBS competitor DirecTV has consistently berated cable companies for raising rates . . . . But DirecTV, like EchoStar, found out it may have spoken too soon. DirecTV had to increase its rate \$2 last year in light of growing costs”).

<sup>27/</sup> Consistent with this, the Satellite Broadcasting and Communications Association reports that “more DBS subscribers than ever before are former cable subscribers.” SBCA Comments at 6.

substantial majority [of these] cancelled their cable subscription once they activated DirecTV.”<sup>28/</sup> As a result of “state-of-the-art technologies,” “additional DBS frequencies and orbital locations,” and “offering of local broadcast channels,” DirecTV undeniably has the “ability to compete with cable . . . .”<sup>29/</sup>

Although EchoStar’s comments devote considerably more energy to rearguing issues pending in (or already decided in<sup>30/</sup>) other proceedings than to answering the questions posed in the Notice of Inquiry, EchoStar does reveal that it had more than 7.165 million customers as of March 21 (*sic?*),<sup>31/</sup> a substantial increase from the 6.07 million it reported as of last June 30.<sup>32/</sup> The company also mentions that it “currently operates seven DBS satellites and plans to launch additional satellites in the future.”<sup>33/</sup>

Meanwhile, the Broadband Service Providers Association (the trade association of overbuilders) reports that its members “are deploying nationwide, fiber-rich, last-mile competitive broadband networks” and that they “currently serve over one million subscribers, have over 17 million homes under franchise, and have over 32,000 miles of fiber deployed.”<sup>34/</sup> BSPA also reports that its members have “constructed systems passing over four million homes” and that they achieve “an average customer penetration

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<sup>28/</sup> DirecTV Comments at 11.

<sup>29/</sup> *Id.* at 1-2.

<sup>30/</sup> See pages 21-22 *infra* (discussion of program access).

<sup>31/</sup> EchoStar Comments at 1. EchoStar subsequently released second quarter numbers that show it had 7.46 million customers as of June 30, 2002. Press Release, *EchoStar Reports Second Quarter 2002 Financial Results* (Aug. 15, 2002).

<sup>32/</sup> Comments of EchoStar Satellite Corporation, CS Docket No. 01-129, at 1 (Aug. 3, 2001). Despite having grown a robust 18% in a mere nine months (and 23% in 12), EchoStar nonetheless claims that “cable’s grip on the MVPD market is tightening.” EchoStar Comments at 1. Such inconsistencies between marketplace facts and EchoStar’s rhetoric are, by now, all too familiar to the Commission.

<sup>33/</sup> *Id.* at 1.

rate of over 25%.<sup>35/</sup> Even though “many [overbuilder] systems [are] still in their early stages of development,” already, these companies have (in addition to their one million video customers) “460,000 telephone subscribers and 560,000 high-speed Internet subscribers.”<sup>36/</sup>

Thus, the comments filed by DirecTV, EchoStar, and BSPA demonstrate conclusively that there is substantial, and constantly growing, MVPD competition.<sup>37/</sup> Additional evidence of intense MVPD competition has emerged in the month since first round comments were filed. This evidence not only provides additional proof of competition but also demonstrates the variety of competitive advantages enjoyed by differing market participants – and the widening array of consumers’ options.

On the very day that first-round comments were filed in this proceeding, DirecTV announced a [national promotion and advertising campaign, highlighting the 2002 NFL “Sunday Ticket” service](#). That promotion provides qualifying consumers with more than \$300 in free programming, so long as they meet minimum eligibility requirements.<sup>38/</sup>

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<sup>34/</sup> BSPA Comments at 2.

<sup>35/</sup> *Id.* at 5.

<sup>36/</sup> *Id.* at 5. One overbuilder says that, although it passed 9000 homes and had 600 customers last year, it now passes 18,000 homes and has nearly 10,000 customers. Everest at 2. The company also asserts that it is “experiencing penetration rates in excess of 50 percent in areas where service has been turned up more than 12 months.” *Id.*

<sup>37/</sup> See also *The Status of Competition in the MVPD Marketplace*, Hearing of the Telecommunications and the Internet Subcommittee of the House Energy and Commerce Committee (Dec. 4, 2001), available at <http://energycommerce.house.gov/107/hearings/12042001Hearing433/hearing.htm>, Statement of Rep. Fred Upton (“DBS has become a solid and formidable competitor with cable in the MVPD marketplace, primarily in urban and suburban areas”), Statement of Mark Pagon, CEO of Pegasus Communications Corporation (“Competition among the cable and satellite companies is working very well for the American consumer”).

<sup>38/</sup> Press Release, *DIRECTV Launches NFL-Themed Fall National Promotion and Advertising Campaign* (July 29, 2002), available at

Exploiting highly desirable programming that is exclusively available to DirecTV, advertisements – which will run in USA Today, Parade, USA Weekend, as well as local newspapers and radio spots – will highlight the NFL Sunday Ticket as the “centerpiece” of the campaign.<sup>39/</sup> As DirecTV emphasizes, this programming “is not available on cable or through any other mini-dish satellite service.”<sup>40/</sup>

In another significant development, DirecTV launched a new digital video recorder (“DVR”). This new device, which will cost most customers \$4.99 per month (and will be free to Total Choice Premiere customers), will store up to 35 hours of programming, enabling viewers to record one program while watching another, and to pause, instant replay, and rewind live TV, as well as fast forward and play back recorded programs in normal speed, slow motion, or frame-by-frame.<sup>41/</sup> The device will also enable customers to record, automatically, every episode of their favorite shows, all season long, even if different episodes of a particular program are being shown on

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[http://www.directv.com/DTVAPP/aboutus/headline.jsp?id=07\\_29\\_2002A](http://www.directv.com/DTVAPP/aboutus/headline.jsp?id=07_29_2002A). To obtain this deal, consumers must purchase a DirecTV System from a participating retailer between Aug. 4 and Oct. 12, 2002, activate 2002 NFL Sunday Ticket at the retail offer price of \$199 (or four payments of \$49.75) and DirecTV's “Total Choice Premier” programming package within 30 days of equipment purchase, and commit to one year of Total Choice monthly programming at the price of \$31.99. *Id.*

<sup>39/</sup> *See id.*

<sup>40/</sup> *Id.*

<sup>41/</sup> Press Release, *DirecTV Debuts New Digital Video Recording Service At SBCA 2002* (Aug. 7, 2002). *See also* Jimmy Schaeffler, *One in Four Households Will Have DVRs*, *Satellite News*, July 22, 2002 (“The rollout of DVR services has become an extension of the early DBS mantra of offering consumers an affordable alternative to cable. DVRs also are the DBS industry’s way of competing with the U.S. cable sector’s implementation of a video on demand service. The competition [between these two services] will become a focal point of marketplace battles in the years ahead”).

different channels at the same time, or to instruct the device to record shows based on their favorite actors, directors, teams and interests.<sup>42/</sup>

For its part, EchoStar launched not one but two new aggressive marketing campaigns during the past month. The DISH Network's "WOW-Free Satellite TV" promotion, initiated at the beginning of August, claims to "offer[] consumers the lowest [priced] all-digital TV channel package in America at only \$22.99 per month for 60 channels and a free professionally installed satellite TV system."<sup>43/</sup> Backed by "an extensive nationwide schedule of print, radio and television advertising," including full-page ads in major market dailies, DISH is offering free professional installation and monthly equipment credits that cover the full cost of one or two DISH301 receivers over the course of one year (though no long-term commitment is required).<sup>44/</sup> One week later, DISH announced another major promotion called "DISH Pak" that offers 60 digital video channels, local channels, and eight premium, commercial-free movie channels from Starz Encore Group LLC, "all for only \$39.99 a month."<sup>45/</sup> Meanwhile, EchoStar also announced an alliance with Wal-Mart stores for the distribution and marketing of DISH Network satellite TV receivers, thereby making them available in 1,900 Wal-Mart stores

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<sup>42/</sup> See *id.*

<sup>43/</sup> Press Release, *DISH Network Campaign Targets Consumers Facing Rising Cable Rates; "WOW - Free Satellite TV" Campaign Offers Lowest, All Digital TV Channel Package in America* (August 1, 2002), "DISH Network Campaign" available at [http://www.corporate-ir.net/ireye/ir\\_site.zhtml?ticker=dish&script=410&layout=-6&item\\_id=321783](http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=321783) .

<sup>44/</sup> See *id.*

<sup>45/</sup> Press Release, *DISH Network Offers New DISH Pak Featuring STARZ! Super Pak, Local And Favorite Channels for Only \$39.99 per Month* (August 8, 2002), available at [http://www.corporate-ir.net/ireye/ir\\_site.zhtml?ticker=dish&script=410&layout=-6&item\\_id=324126](http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=324126) .

nationwide.<sup>46/</sup> Not all of this competition follows conventional avenues (and some of its retailers' practices are under investigation)<sup>47/</sup> but there can be no doubt that DBS is in fact competing intensely.<sup>48/</sup> And yet, despite this kind of aggressive, nationwide, competitive pricing, various consumer groups continue to claim – incredibly – that DBS only competes for “two niches – a rural niche and a mega-service niche,” while the benefits of competition continue to elude “lunch bucket” customers.<sup>49/</sup> The facts, obviously, are to the contrary.

Overbuilders, too, have continued to launch new competitive initiatives. Earlier this month, RCN introduced a third bundled package to its “RCN Essentials” bundled product line. “Designed to appeal to RCN’s internationally diverse customer base, the

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<sup>46/</sup> Press Release, *EchoStar's DISH Network Satellite TV Systems Now Available at Wal-Mart Stores Nationwide; Wal-Mart Stores to Distribute RCA Branded Products* (Aug. 1, 2002), available at [http://www.corporate-ir.net/ireye/ir\\_site.zhtml?ticker=dish&script=410&layout=-6&item\\_id=322281](http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=322281). EchoStar has also established distribution arrangements with RadioShack. EchoStar's Charlie Ergen is reported to have said that these new partnerships are expected to boost DISH sales in the second half of 2002. *Ergen Says He's Confident of EchoStar-DirecTV Deal Approval*, Comm. Daily, Aug. 16, 2002, at 5.

<sup>47/</sup> See Sallie Hofmeister, *L.A. Probing Marketers of Dish Network*, Los Angeles Times, Aug. 5, 2002; Comm. Daily, Aug. 8, 2002, at 13 (EchoStar investigating allegations “that DISH retailers in [Los Angeles] were giving prospective customers false information about bankrupt cable operator Adelphia in an effort to sell more DBS systems”); see also *10 States Investigate EchoStar Practices*, N.Y. Times, Aug. 16, 2002, at C6 (EchoStar's business practices are under investigation by attorneys general in 10 states; issues pertain to consumer protection laws relating to call response times, advertising, customer agreement disclosures, consumer complaints, rebates, refunds and cancellation fees).

<sup>48/</sup> See also Amy Harmon and Jennifer 8. Lee, *Deal Bolsters Satellites as Cable TV Competitors*, N.Y. Times, Dec. 17, 2001 (quoting Harold L. Vogel, a media analyst and author, as saying, “Satellite will erode market share of cable on a global basis because it is easier to implement . . . . You throw up a dish, and you've got it”); Press Release, *ILS Proton Successfully Launches EchoStar VIII Satellite* (Aug. 22, 2002) (new satellite enables EchoStar to expand local-into-local service to additional cities).



new Essentials/International package offers consumers cable TV service, local and long distance calling, and a choice of one international premium cable channel and one international calling plan.”<sup>50/</sup> This is a continuation of a strategy that, thus far, has been available only to overbuilders, not DBS or most cable companies, because it draws on the inherent flexibility of the overbuilders’ newly-constructed, state-of-the-art networks to combine video, voice, and data services.<sup>51/</sup> And new overbuilders are making the competition fiercer than ever, driving cable operators to invest and innovate, just as DBS has done.<sup>52/</sup>

Meanwhile, the prospects for still more video competition were further strengthened by two recent developments affecting TV broadcasting. On August 8, the Commission adopted requirements to ensure the availability of DTV tuners in new television receivers over the next several years,<sup>53/</sup> thereby ensuring that consumers will be able to receive DTV programming “without subscribing to a cable service [or DBS] or

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<sup>49/</sup> See, e.g., Comments of Consumer Federation of America, *et al.*, CS Docket No. 98-82, at 149 (Jan. 4, 2002).

<sup>50/</sup> Press Release, *RCN Introduces Essentials/International Package to its New Family of Bundled Services* (Aug. 6, 2002), available at <http://www.rcn.com/investor/press/index.html>.

<sup>51/</sup> Press Release, *RCN Corporation Launches New Product Line of Bundled Communications Services* (May 9, 2002), available at <http://www.rcn.com/investor/press/index.html>. David C. McCourt, RCN’s Chairman and CEO, has claimed that these offers “really position[] RCN as the nation’s leading bundler of communications services . . . .” *Id.*

<sup>52/</sup> See Andrea Figler, *Cox Aims to Get Back on Track in Phoenix*, Cable World, Aug. 5, 2002, at 34 (competition from an overbuilder and DBS providers have dogged Cox in Phoenix; competitive pressures are forcing Cox to add HDTV service).

<sup>53/</sup> FCC Press Release, *FCC Introduces Phase-In Plan for DTV Tuners* (Aug. 8, 2002), available at <http://www.fcc.gov/mb/>.

buying an extra set-top box for digital signals.”<sup>54/</sup> And a leading commentator on the broadcasting industry set forth a plan whereby local broadcasters could share spectrum to collectively offer a package of services that “compete head-to-head with cable and satellite, offering a mix of the long-promised high-definition television, and standard-definition television, data for computers and possibly even Internet access.”<sup>55/</sup> Under such an approach, broadcasters could become “multichannel players with major program offerings and multiple revenue streams,”<sup>56/</sup> though, in fairness, the feasibility of this proposal remains to be determined, particularly since the broadcasters’ “response to the promise and inevitability of digital television” has been “almost always short of the mark.”<sup>57/</sup>

In another significant development, one of the major broadcasting networks launched a new effort to sell its content through video streaming on the Internet. For \$4.95 per month, viewers with a broadband connection will be able to watch streamed versions of *World News Tonight With Peter Jennings* along with *Nightline*, *Nightline UpClose* and other news content, on a delayed basis.<sup>58/</sup> The success of such ventures

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<sup>54/</sup> *FCC Votes To Require Digital Tuners in New Televisions*, Associated Press (Aug. 8, 2002), available at <http://www.nytimes.com>.

<sup>55/</sup> See Harry A. Jessell, *Sink or Swim*, Broadcasting & Cable, Aug. 5, 2002, at 14.

<sup>56/</sup> See *id.* at 16. Even without such spectrum sharing, an individual broadcaster could provide a similar mix of services now that the Commission has relaxed its TV duopoly rule to permit the ownership of up to two television stations in certain markets, see 47 C.F.R. § 73.3555(b), and each 6 MHz channel is capable of transmitting multiple streams of video programming.

<sup>57/</sup> *Id.* at 14. In this regard, it is noteworthy that “almost 70% of the nation’s 1240 commercial television stations missed the government’s May 1 deadline to begin transmitting some digital programming.” Yochi J. Dreazen, *FCC Gives TV Makers Deadline of 2006 To Roll Out Digital Sets*, Wall St. J., Aug. 6, 2002, at A1.

<sup>58/</sup> Ken Kerschbaumer, *ABC News Pay for Play*, Broadcasting & Cable, Aug. 5, 2002, at 25.

remains to be seen, but clearly there is a belief in some quarters that broadband Internet will become a separate video delivery system.<sup>59/</sup>

Yet another form of video competition was highlighted in a recent *Washington Post* story. According to the *Post*, 670,000 people now subscribe to Netflix, a service that allows viewers to watch “an unlimited number of DVDs for \$19.95 per month,” keeping three movies at a time and receiving additional ones as others are returned in prepaid mailers.<sup>60/</sup> This new service has prompted Blockbuster, the “King Kong of movie rentals,” to roll out “an in-store version of a DVD subscription service.”<sup>61/</sup> The *Post* story quotes users who say that they use this service instead of buying pay-per-view movies from an MVPD or otherwise watching TV.<sup>62/</sup>

In short, there is abundant evidence that consumers seeking video programming now enjoy a wider array of options than ever before. Most households have a choice of three or four MVPDs; they have multiple local broadcasters, including a number offering DTV; they can obtain video programs from neighborhood video stores and companies

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<sup>59/</sup> To the Commission’s credit, this year’s Notice of Inquiry explicitly seeks to develop a record on all competing forms of video delivery, instead of confining the discussion to multi-channel video programming distributors. *Notice* at ¶ 1. As the discussion here shows, the video options available to consumers include several non-MVPD means of delivering programming, all of which have a disciplining effect on MVPD behavior.

<sup>60/</sup> Leslie Walker, *Now Showing, in Your Mailbox*, Wash. Post, Aug. 11, 2002, at H1.

<sup>61/</sup> *See id.* at H4 (service began in four markets on a trial basis in late July and national release is tentatively slated for September; price is \$24.95/month; prepaid mailer return may be added).

<sup>62/</sup> *Id.* at H5. *See also* Ethan Zindler, *Feel Like Staying on the Couch? DVD Rentals by Mail May Help*, Wall St. J., Aug. 20, 2002, at D2 (reporting on four such services: Netflix, DVD Avenue, Qwikfiks, and CafeDVD.com).

like Netflix; and they can access streaming video over the Internet. The choices are endless.

Against this backdrop, notions of “monopoly” and “market power” and “dominance” in video distribution are completely misplaced.<sup>63/</sup> Competition for viewers’ attention is intense; viewers have multiple means of obtaining video programming that are not subject to MVPD control, even if there were not such robust competition among MVPDs. In such an environment, MVPDs must continue to invest and to innovate, each one hoping to outdo its competitors in delivering the services that consumers want, at prices they are willing to pay. The management and 38,000 employees<sup>64/</sup> of Comcast are working hard to ensure that Comcast will continue to be the video supplier of choice to a majority of consumers in the areas it serves, but intense competition clearly makes this a challenge. As is typical in a competitive marketplace, outcomes are by no means guaranteed.<sup>65/</sup>

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<sup>63/</sup> This was explicitly recognized in a major speech by the Chief of the Media Bureau. *See* Remarks of W. Kenneth Ferree, 2002 Annual Convention of the National Association of Minority Media Executives, Chicago, IL, (July 19, 2002), *available at* [www.fcc.gov/mb](http://www.fcc.gov/mb) (“Despite all of the sound and fury about consolidation, the fact is the media markets today are more vibrant and robustly competitive than ever before. Today each of us has far more media options than we did even a few years ago; options both in terms of format and program diversity, and options in terms of access to alternative viewpoints”).

<sup>64/</sup> *See* 2001 Comcast Annual Report, at 17 (June 5, 2002).

<sup>65/</sup> *See, e.g.,* Seth Schiesel, *Cablevision Will Retrench by Shedding Jobs and Stores*, N.Y. Times, Aug. 9, 2002, at C4 (citing “concern . . . that cable companies are not generating enough financial returns to justify the billions of dollars companies have invested to provide digital TV and high-speed Internet access. Even though millions of customers are signing up for those services, short-sellers – who profit when shares decline – are telling other investors that cable companies will never generate adequate returns because they will always face another round of expensive upgrades”). Needless to say, Comcast does not share the assessment of those quoted in this article, but such

### III. PUBLIC POLICY ISSUES

In their first-round comments, DirecTV and EchoStar (particularly the latter) focus heavily on the reasons why they believe they should be allowed to proceed with their proposed merger,<sup>66/</sup> and the National Rural Telecommunications Cooperative summarizes its reasons for believing that the DirecTV/EchoStar merger is anticompetitive.<sup>67/</sup> These issues are being fully discussed and evaluated in a docket opened explicitly for that purpose, and there is no particular reason why any of this belongs in this proceeding. Nor is there any reason for Comcast to recount, in *this* docket, the many public interest benefits that will result from our proposed merger with AT&T Broadband. Those benefits have been abundantly demonstrated in MB Docket No. 02-70 and need not be repeated here.<sup>68/</sup>

A brief response is needed, however, to certain misstatements and misrepresentations that the Broadband Service Providers Association has recklessly republished here. Various portions of BSPA's pleading are cut-and-pasted from pleadings filed by RCN in the Comcast-AT&T Broadband merger proceeding. Those allegations have been thoroughly answered – and refuted – in the merger docket (and in other proceedings and venues).<sup>69/</sup> Yet the persistent repetition of these false charges –

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views are part of the environment in which Comcast must compete for talent and for capital.

<sup>66/</sup> EchoStar Comments at 2, 4-8; DirecTV Comments at 2.

<sup>67/</sup> NRTC Comments at 1-2, 9-13.

<sup>68/</sup> See *Public Interest Statement* at 28-48; AT&T Corp. and Comcast Corporation, Reply to Comments and Petitions to Deny Applications for Consent to Transfer of Control, MB Docket No. 02-70, at 6-23 (May 21, 2002) ("*Comcast Merger Reply*").

<sup>69/</sup> *Comcast Merger Reply* at 54-58 (access to programming), 97-105 (additional program access issues and allegations), 112-115 (cable pricing practices), 116-120 (franchise disputes, access to MDUs, and employment of contractors) (May 21, 2002);

here and in other proceedings – threatens to compromise the Commission’s fact-finding effort in the instant docket. Accordingly, we recap here our earlier responses.:

- Claims about secret and discriminatory predatory pricing<sup>70/</sup> by cable paint an ominous portrait, while the facts suggest precisely the kinds of competitive responses that policymakers should expect, and desire, in a *competitive* market for an *unregulated* service.
  - Comcast is aware of no evidence that a single cable operator has priced its service below its “average or marginal variable costs.”<sup>71/</sup> If BSPA is aware of any such evidence, it has had ample opportunity to produce it, and its failure to do so speaks volumes. Given that Comcast – and, as far as it knows, other cable operators – typically meets rather than beats overbuilders’ prices, it is improbable that any such evidence exists.
  - Comcast is aware of no evidence that any of the discounts that are being offered apply to services that are subject to the Commission’s uniform rate requirements. Comcast, at least, discounts only those services that have been deregulated (the cable programming service tier) or that have never been regulated (digital video, premium channels, PPV).<sup>72/</sup>
  - In the wireless context, the Commission has expressly approved the offering of better prices or other discounts as vehicles for customer retention or winback.<sup>73/</sup>
  - What BSPA is trying to force cable operators to do is to have tariffed price schedules – from which an MSO may never deviate – for all

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Letter from James L. Casserly, Counsel to Comcast, to Marlene Dortch, FCC Secretary, MB Docket No. 02-70 (Aug. 1, 2002) (noting, among other things, the dramatic differences between the story RCN told the Securities and Exchange Commission, where there are penalties for falsehoods, and the story RCN tells the FCC, where no such penalties apply); Reply Comments of Comcast Corporation, CS Docket No. 01-290, at 7-9 (Jan. 7, 2002) (responding to misguided claims about purported “evasion” of the program access rules).

<sup>70/</sup> See BSPA Comments at 10-11.

<sup>71/</sup> See *id.* at 10.

<sup>72/</sup> Incongruously, even as BSPA claims (at 11) that “[i]ncumbent cable operators tend to tailor their response to competitive entry as narrowly as possible, often limiting their rate and cash incentives to customers lost to BSPA members,” one of BSPA’s members complains about a Time Warner “winback” offer that is available “even if the apartment dweller has not even switched to Everest services.” Everest at 7. Apparently these competitors would have the Commission condemn *any* form of competitive pricing.

<sup>73/</sup> *Orloff v. Vodafone Airtouch*, 17 FCC Rcd. 8987 (2002).

video services. There is no such requirement in Title VI, especially for deregulated and unregulated services. And, unlike BSPA, policymakers and consumers alike generally view price competition as beneficial and desirable.

- Claims relating to exclusive contracts with building owners<sup>74/</sup> are the subject of a separate rulemaking and require no separate briefing here. As a factual matter, however, we note that (1) our MDU contracts are typically exclusive *marketing* arrangements, not exclusive *access* arrangements, and (2) overbuilders make precisely the same sorts of contractual arrangements (in Washington, DC, RCN sought and obtained numerous such arrangements).
- Claims about overbuilders' access to construction and installation personnel and to set-top boxes and emerging technologies<sup>75/</sup> have been answered at length in the Comcast-AT&T Broadband merger proceeding. There is no credible evidence that any overbuilder has been unable to hire the labor or to buy the technology that it needs to compete.<sup>76/</sup>

Overbuilders, like most telecommunications and information service providers, do in fact face a very challenging market environment, most notably because of current circumstances in the capital markets.<sup>77/</sup> But there is no excuse for their efforts to persuade the government to impose substantial burdens on cable operators – burdens that deny consumers the benefits of competition – without even a colorable statutory basis for such intervention in the marketplace.

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<sup>74/</sup> See BSPA at 16-17.

<sup>75/</sup> See *id.* at 17-19.

<sup>76/</sup> Given the massive layoffs that the industry as a whole has experienced over the past two years (500,000 employees, according to FCC Chairman Powell), the supply of skilled labor plainly exceeds demand.

<sup>77/</sup> Despite this, some overbuilders are pressing ahead. See, e.g., Duffy Hayes, *Are Overbuilders Keeping the Pace?*, CED, Apr. 1, 2002, available at <http://www.cedmagazine.com/ced/2002/0402/04d.htm> (“Knology is busy building out a new network in Knoxville, Tenn., which it has been able to fund because of success in other southern markets where it has been generating revenue”); Peter J. Howe, *Mixed Signals: Even as it Gains Customers, RCN is Deep in Debt*, Boston Globe, July 18, 2002, at E1 (“New figures filed with state regulators show that RCN is achieving, and in some towns exceeding, the 30 percent market share at which industry analysts say it has a shot at becoming profitable. RCN has more than 37 percent of all cable homes in Lexington, for example, and 33 percent in Framingham. . . . Late last year, Boston

Very little need be said about the comments from various DBS and overbuilder interests about issues of “program access.”<sup>78/</sup> The simple fact is that the FCC decided, earlier this year, to extend for five years the exclusivity prohibition that was scheduled to sunset in October 2002.<sup>79/</sup> Although Comcast did not agree with that decision, we see no reason to make an issue of that disagreement here; it suffices to note that the Commission’s action was if anything more than adequate to address any potential concern.

We see even less reason why those who *prevailed* in that rulemaking should continue to assert any possibility that they will be denied access to the programming that they desire.<sup>80/</sup> And, despite the speculation that satellite-delivered programming will be

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became the first RCN market to produce positive earnings before interest, taxes, depreciation, and amortization (EBITDA)).

<sup>78/</sup> See BSPA Comments at 11-16; DirecTV Comments at 9-11; EchoStar Comments at 9-11; SBCA Comments at 16-18.

<sup>79/</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition, Report and Order*, 17 FCC Rcd.12124 (2002).

<sup>80/</sup> EchoStar’s assertion that Comcast’s lawful refusal to provide it with access to Comcast SportsNet is “blatantly harmful” to DBS competition, *see* EchoStar at 10-11, has been answered at length in the AT&T/Comcast merger proceeding. *Comcast Merger Reply* at 102-104. EchoStar has now embellished this argument by quoting from the Program Access Order’s statement that DBS penetration in Philadelphia is below the *national* DBS penetration rate. EchoStar at 11 & n.24. This misses the point entirely. DBS penetration in urban areas is *invariably* below the national average (which includes suburban and rural areas), and DBS penetration in urban areas in the Northeastern United States is routinely lower than in other urban areas. More particularly, EchoStar’s argument falls before these facts: (1) *DBS penetration is no higher in several other major markets* including San Diego and Boston, where there is no issue of a terrestrially-delivered, cable-affiliated regional sports network, than it is in Philadelphia; (2) the two-year growth rate for DBS in Philadelphia (141%) is the *highest* of any top 10 market; and (3) the three-year DBS growth rate in Philadelphia (217%) is the third-highest of the top 39 DMAs. *See Comcast Merger Reply* at 104 & nn. 317-320 and authorities cited therein.



migrated to terrestrial delivery,<sup>81/</sup> there is *no evidence whatsoever*, in this proceeding or elsewhere, of such a trend.

#### IV. CONCLUSION

Comcast urges the Commission to use the occasion of the 9<sup>th</sup> annual video competition report to acknowledge the robust competition that has emerged in the business of delivering video programming to consumers. Instead of merely reporting on the incremental changes from the prior year (*e.g.*, cable loses another two points of MVPD market share), we urge the Commission to recognize, explicitly, the many different ways in which video programming can be delivered to consumers – both through competing MVPDs *and* independent of any MVPD – and the intense competition, significant capital investment, rapid technological change, and concomitant risk that now characterize the video marketplace. We also suggest that the Commission

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<sup>81/</sup> *E.g.*, BSPA Comments at 15. Although BSPA claims “[i]ncumbent cable operators have both the opportunity . . . [and] the incentive . . . to refuse to provide [terrestrially delivered video] programming to competitive providers,” *id.*, experience shows otherwise. Based on BSPA’s theory, Comcast would withhold Comcast SportsNet from overbuilders and would move networks that are currently delivered via satellite to terrestrial delivery. In fact, however, Comcast has *always* made Comcast SportsNet available to overbuilders (RCN has carried Comcast SportsNet since it was created, and has been offered a five-year renewal agreement on the same terms as all other affiliates; Comcast also provided Comcast SportsNet to Bell Atlantic when Bell Atlantic was competing in Comcast’s service area), and Comcast has *not* migrated any networks from satellite to terrestrial delivery. Cable competitors have been spreading this “Chicken Little” scenario for over five years, but it has no basis in fact.

**Reply Comments of Comcast Corporation**  
**MB Docket No. 02-145**  
**August 30, 2002**

describe the fundamental changes that have occurred in video programming delivery since 1992 and conclude that these salutary developments are most likely to continue if regulation of cable operators is kept to the absolute minimum required by law.

Respectfully submitted,

Thomas R. Nathan  
COMCAST CABLE COMMUNICATIONS, INC.

Joseph W. Waz, Jr.  
COMCAST CORPORATION  
1500 Market Street  
Philadelphia, Pennsylvania 19102

James R. Coltharp  
COMCAST CORPORATION  
2001 Pennsylvania Avenue, NW  
Suite 500  
Washington, D.C. 20006

August 30, 2002

James L. Casserly  
MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY AND POPEO, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

WDC 318984v9